Supreme Court, U.S.
FILED
OCT 1 - 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1417.

In the Supreme Court of the United States.

OCTOBER TERM, 1980.

MARK MILLS, ET AL.,
PETITIONERS,
v.
RUBIE ROGERS, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for the Mental Health Legal Advisors Committee as Amicus Curiae.

ROBERT H. WEBER,
Mental Health Legal Advisors Committee,
294 Washington Street,
Suite 840,
Boston, Massachusetts 02108.
(617) 723-2876

JONATHAN BRANT,
New England School of Law,
126 Newbury Street,
Boston, Massachusetts 02116.
(617) 267-9655

On the Brief:
RICHARD CASTELNUOVO

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Questions Presented.

1. May an involuntarily hospitalized mental patient be administered anti-psychotic medication without his consent?

2. Does Massachusetts law, as recently articulated by the state's highest court, control the forcible medication of non-consenting, institutionalized mental patients?

Table of Contents.

Interest of amicus curiae	1
Summary of argument	2
Argument	4
I. Involuntarily hospitalized mental patients have a right to refuse intrusive medical treatment involving the administration of anti-psychotic drugs	4
II. As a matter of state law, a medical treatment decision made on behalf of an incompetent person must give the fullest possible expression to the personal preferences of the ward	6
A. Massachusetts law requires a judge to act as substitute decisionmaker to consent to the administration of anti-psychotic medication to an incompetent person	9
B. The judicial decisionmaker must apply the substituted judgment test	10
C. Civilly committed persons retain the right to refuse treatment	12
III. This court should dismiss the grant of certiorari as improvidently granted because the Massachusetts courts, applying Massachusetts law, have settled the issues of this lawsuit for that state	14
Conclusion	17

Table of Authorities Cited.

Cases.

Addington v. Texas, 441 U.S. 418 (1979)	15
Allegheny County v. Mashuda Co., 360 U.S. 185 (1959)	17

Colorado River Water Conser. Dist. v. United States, 424 U.S. 800 (1976) 17

Commissioner of Correction v. Myers, Mass. Adv. Sh. (1979) 2523, 399 N.E.2d 452 12

Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969) 7

Custody of a Minor, 375 Mass. 733, 379 N.E.2d 1053 (1978), on review and redetermination, 377 Mass. 876, 393 N.E.2d 836 (1979) 16

Davis v. Hubbard, 506 F.Supp. 915 (N.D. Ohio 1980) 6

Doe v. Doe, 377 Mass. 272, 385 N.E.2d 995 (1979) 7, 8

Fazio v. Fazio, 375 Mass. 394, 378 N.E.2d 951 (1978) 2, 7

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) 14

Goedecke v. State Department of Institutions, 603 P.2d 123 (Colo. 1979) 6

Guardianship of Bassett, 7 Mass. App. Ct. 56, 385 N.E.2d 1024 (1979) 7, 8

Harris v. McRae, 448 U.S. 297 (1980) 15

Herb v. Pitcairn, 324 U.S. 117 (1945) 14

Ingraham v. Wright, 430 U.S. 651 (1977) 5

In re Boyd, 403 A.2d 744 (D.C. Ct. App. 1979) 11

In re KKB, 609 P.2d 747 (Okla. 1980) 6

In re Quinlan, 70 N.J. 10, 355 A.2d 647 (1976) 6

In re Storar, 52 N.Y.2d 363, 438 N.Y.S.2d 266, 420 N.E.2d 64 (1981) 5, 6

In the Matter of Guardianship of Roe, Mass. Adv. Sh. (1981) 981, 421 N.E.2d 40 2, 3, 4, 5, 6 et seq.

In the Matter of Spring, Mass. Adv. Sh. (1980) 135, 399 N.E.2d 493, rev'd and remanded, Mass. Adv. Sh. (1980) 1209, 405 N.E.2d 115 2, 16

Jacobson v. Massachusetts, 197 U.S. 11 (1905) 12

Lane v. Candura, 6 Mass. App. Ct. 377, 376 N.E.2d 1232 (1978) 5

Moe v. Secretary of Administration and Finance, Mass. Adv. Sh. (1981) 464, 417 N.E.2d 387 15, 16

Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874) 14

Ohio v. Gallagher, 425 U.S. 257 (1976) 16

People v. Disbrow, 16 Cal.3d 101, 127 Cal. Rptr. 360, 545 P.2d 272 (1976) 15

Reddington v. Clayman, 334 Mass. 244, 134 N.E.2d 920 (1956) 5

Rennie v. Klein, 653 F.2d 836 (3d Cir. 1981) 4

Rogers v. Okin, 478 F.Supp. 1342 (D. Mass. 1979) (Rogers I), aff'd in part, rev'd in part, 634 F.2d 650 (1st Cir. 1980) (Rogers II), cert. granted, 101 S.Ct. 1972 (1981) 4, 13, 16

Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92 (1914) 5, 13

State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975) 15

State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974) 15

State v. Kinney, 138 Neb. 574, 293 N.W. 393 (1940), rev. sub. nom., Olsen v. Nebraska, 313 U.S. 236 (1941), on remand, Boomer v. Olsen, 143 Neb. 579, 10 N.W.2d 507 (1943) 15

Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977) 2, 4, 5, 6, 7 et seq.

Superintendent of Worcester State Hospital v. Hagberg, 374 Mass. 271, 372 N.E.2d 242 (1978) 15

CONSTITUTIONAL PROVISIONS.

United States Constitution 2
Fourteenth Amendment 4

STATUTES AND REGULATIONS.

Massachusetts General Laws
c. 123, § 21 9n
c. 201 7
§ 4 7
§ 6 7
§ 6A 7
c. 221, § 34E 1, 2
104 C.M.R.
Regulation 310(12) 12
Regulation 312 9n

MISCELLANEOUS.

Bellotti and Schultz, "Federalism — The Massachusetts Experience," 12 Suffolk U. L. Rev. 1225 (1978) 16
Brant, "Last Rights: Analysis of Refusal and Withholding of Treatment Cases," 46 Mo. L. Rev. 337 (1981) 6, 16
Brennan, "State Constitutions and the Protection of Individual Rights," 90 Harv. L. Rev. 489 (1977) 15
Brooks, "The Constitutional Right to Refuse Antipsychotic Medications," 8 Bull. Am. Ac. Psychiatry and the Law, 179 (1981) 5
Case Comment, 15 Georgia L. Rev. 739 (1981) 6

Douglas, "State Judicial Activism — The New Role for State Bills of Rights," 12 Suffolk U. L. Rev. 1123 (1978) 16

Hennessey, "The Extraordinary Massachusetts Constitution of 1780," 14 Suffolk U. L. Rev. 873 (1980) 15

Howard, "State Courts and Constitutional Rights in the Day of the Burger Court," 62 Va. L. Rev. 873 (1976) 14

Prosser, Torts, § 18 (4th ed. 1971) 5

Rhodden, "The Right to Refuse Psychotropic Drugs," 15 Harv. C.R. — C.L.L. Rev. 363 (1980) 5

Wilkins, "Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution," 14 Suffolk U. L. Rev. 887 (1980) 15

Zlotnick, "First Due No Harm: Least Restrictive Alternative Analysis and the Right of Mental Patients to Refuse Treatment," 83 W. Va. L. Rev. 375 (1981) 7

No. 80-1417.

In the Supreme Court of the United States.

OCTOBER TERM, 1980.

MARK MILLS, ET AL.,
PETITIONERS,
v.
RUBIE ROGERS, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for the Mental Health Legal Advisors Committee as Amicus Curiae.

Interest of Amicus Curiae.

The Mental Health Legal Advisors Committee is an organization created by M.G.L. c. 221, § 34E to assist and advise indigent patients and residents of mental health facilities concerning their legal rights. *Amicus Curiae* is an organization mandated by state law to protect the legal rights of indigent residents of mental health and retardation facilities. *Amicus* and the clients it represents assert a special interest in the matter now before this Court. The case raises issues directly affecting the civil rights and liberties of institutionalized mentally disabled persons.

The Mental Health Legal Advisors Committee is charged with the responsibility of developing and coordinating a program "to assist and advise indigent patients and residents in Bridgewater State Hospital and all other mental health and retardation facilities of the commonwealth concerning their legal rights." M.G.L. c. 221, § 34E. The Committee, among its other duties, has the responsibility of conducting a continuing program of information to educate patients and residents about their legal rights. The Committee has participated as *Amicus* in four leading cases heard before the Supreme Judicial Court of Massachusetts. *In the Matter of Guardianship of Roe*, Mass. Adv. Sh. (1981) 981, 421 N.E.2d 40; *In the Matter of Spring*, Mass. Adv. Sh. (1980) 135, 399 N.E.2d 493, *rev'd and remanded*, Mass. Adv. Sh. (1980) 1209, 405 N.E.2d 115; *Fazio* v. *Fazio*, 375 Mass. 394, 378 N.E.2d 951 (1978); *Superintendent of Belchertown State School* v. *Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977). Each of these cases raised issues closely related to those raised by this case. *Amicus* is particularly sensitive to the issues presented in this case as a result of its participation as *Amicus* in the First Circuit Court of Appeals review of this case.

Amicus has received the consent to the filing of this brief from the parties. A copy of the letter of consent is being filed with the clerk of this Court at the time of the filing of this brief.

Summary of Argument.

The United States Constitution and Massachusetts law guarantee the right of an individual to participate in his own medical treatment. The universally accepted medical practice of requiring a patient's informed consent to treatment affirms this right.

This case involves the forcible administration of anti-psychotic medication to mental patients who are committed to a state mental hospital. Neither the patient's mental illness nor the environment of a state mental hospital permit the denial of the patient's right to participate in the decision to utilize anti-psychotic drugs to treat his illness.

Mental patients, due to the very nature of their disability, are sometimes unable to competently exercise this right. Under these circumstances, Massachusetts law, as clearly articulated by the Supreme Judicial Court, requires an alternative decision-maker, exercising the substituted judgment of the incompetent person, to protect the patient's rights, by making the choice the person would have made if he were competent.

The choice of an appropriate substitute decisionmaker requires the application of difficult and sensitive conflicting interests. The Massachusetts court has provided guidelines which must be followed whenever it is necessary to appoint a substitute decisionmaker. The court has also established the standards for the proper application of the substituted judgment rule.

These guidelines and standards were laid down in a recent Massachusetts case involving the forcible administration of anti-psychotic medication to a non-institutionalized mental patient. *In the Matter of Guardianship of Roe*, Mass. Adv. Sh. (1981) 981, 421 N.E. 2d 40. The decision in that case clearly stated the court's intention to provide rules to be applied by Massachusetts courts presented with similar situations. The case at bar is the type of case the Supreme Judicial Court anticipated and requires the application of the rule of law described in *Roe*.

Amicus believes the rule of law decided in *Roe* is controlling. We believe the right to refuse medication is founded in Massachusetts law and must be recognized by this Court. Further, the principles articulated in *Roe*, when applied to the patients at Boston State Hospital, will protect important rights which those patients possess despite the fact of their commitment.

Argument.

I. Involuntarily Hospitalized Mental Patients Have a Right to Refuse Intrusive Medical Treatment Involving the Administration of Anti-Psychotic Drugs.

This case involves an aspect of the right of privacy which "is an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life," *Superintendent of Belchertown State School* v. *Saikewicz*, 373 Mass. 728, 742, 370 N.E.2d 417, 426 (1977). The value of life is demeaned by failure to respect an individual's refusal to undergo intrusive and dangerous medical treatment. *Id.*

The Court of Appeals recognized that the existence of this right was indisputable: "[this] . . . seems to us to be an intuitively obvious proposition: a person has a constitutionally protected interest in being left free by the state to decide for himself whether to submit to the serious and potentially harmful medical treatment that is represented by the administration of antipsychotic drugs." *Rogers* v. *Okin*, 634 F.2d 650, 653 (1st Cir. 1980), *cert. granted*, 101 S.Ct. 1972 (1981). Accord, *Rennie* v. *Klein*, 653 F.2d 836 (3d Cir. 1981). The Supreme Judicial Court of Massachusetts recently reaffirmed the right of all persons to refuse unwanted medical treatment, *In the Matter of Guardianship of Roe*, Mass. Adv. Sh. (1981) 981, 1000 n.9, 421 N.E.2d 40, 51 n.9. The court in *Roe* was asked to decide whether the guardian of a mentally ill, non-institutionalized person possesses the authority to consent to the administration of anti-psychotic medication over the objection of his ward. The Supreme Judicial Court agreed with the First Circuit in the case at bar identifying a right to refuse medication based on the right of privacy, bodily integrity and personal security found in the due process clause of the Fourteenth Amendment. Furthermore, the Massachusetts court

did not base its finding solely on the United States Constitution. *Roe*, *supra*, Mass. Adv. Sh. at 983 n.1, 421 N.E.2d at 42. The court concluded that the right to refuse medical treatment has as its foundation the common law right "of every person 'of adult years and sound mind . . . to determine what shall be done with his own body,'" *Roe*, *supra*, Mass. Adv. Sh. at 1000 n.9, 421 N.E.2d at 51, quoting *Schloendorff* v. *Society of New York Hospital*, 211 N.Y. 125, 129, 105 N.E. 92 (1914) (Cardozo, J.). This common law right of all citizens to be free from unwanted bodily intrusions has been widely recognized. *Ingraham* v. *Wright*, 430 U.S. 651, 673 (1977), ("[a]mong the historic liberties . . . was a right to be free from . . . unjustified intrusions on personal security").

This strong interest in maintaining autonomy and self-determination finds powerful expressions in the doctrine of informed consent. *Saikewicz*, *supra*, 373 Mass. at 744, 370 N.E.2d at 424. Any medical treatment administered in non-emergencies must be accompanied by valid consent. *Reddington* v. *Clayman*, 334 Mass. 244, 134 N.E.2d 920 (1956); Prosser, *Torts*, § 18 at 102-3 (4th ed. 1971). For consent to be valid, it must be knowledgeable, competent and voluntary. Rhodden, "The Right To Refuse Psychotropic Drugs," 15 Harv. C.R. — C.L.L. Rev. 363 (1980). Brooks, "The Constitutional Right To Refuse Antipsychotic Medications," 8 Bull. Am. Ac. Psychiatry and the Law, 179 (1981).

A refusal to submit to treatment, though medically not in the best interest of the patient, must be honored if the decision is competently and knowledgably made. *Lane* v. *Candura*, 6 Mass. App. Ct. 377, 376 N.E.2d 1232 (1978); *In re Storar*, 52 N.Y.2d 363, 438 N.Y.S.2d 266, 420 N.E.2d 64 (1981). In *Lane*, the court deferred to the patient's decision to forego the life-saving treatment of amputating a gangrenous limb. Her decision, as medically unwise as it may have been, was the product of a competent mind capable of appreciating the risk

and benefits of a refusal. The law of Massachusetts unequivocally secures this right of individual self-determination. *Id.*; see *Roe, supra*, Mass. Adv. Sh. at 1017 n.20, 421 N.E.2d at 59 n.20.

Recently courts have been asked to apply the doctrine of informed consent to extraordinarily complex situations involving incompetent patients. See, *e.g.*, *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976); *Superintendent of Belchertown State School* v. *Saikewicz, supra*; *see generally In re Storar, supra*; Brant, "Last Rights: Analysis of Refusal and Withholding of Treatment Cases," 46 Mo.L.Rev. 337 (1981). The difficult task for the court in each of these cases was the fashioning of a procedural mechanism which would allow the patient to effectively exercise his right of choice.

The context in which the right is to be exercised has been held not to compromise this right. The Colorado Supreme Court recently addressed the question of whether a civilly committed mental patient could continue to refuse the administration of anti-psychotic medication. The court concluded, "[t]he statutory and common law right of this state afford the appellant a right to withhold consent to the administration of prolixin in non-emergency circumstances." *Goedecke* v. *State Department of Institutions*, 603 P.2d 123, 125 (Colo. 1979). See also *In re KKB*, 609 P.2d 747 (Okla. 1980); *Davis* v. *Hubbard*, 506 F.Supp. 915 (N.D. Ohio 1980). See generally Case Comment, 15 Georgia L. Rev. 739 (1981).

II. As a Matter of State Law, a Medical Treatment Decision made on Behalf of an Incompetent Person Must give the Fullest Possible Expression to the Personal Preferences of the Ward.

Those persons who can neither comprehend the nature of a proposed medical treatment nor appreciate the consequences

of accepting or rejecting that treatment are not legally competent either to give or withhold consent. Such persons are proper subjects for the appointment of a guardian. As a function of its *parens patriae* power, the state can authorize a court-appointed decisionmaker to act on behalf of the incompetent person to advance his best interest (M.G.L. c. 201, §§ 4, 6 and 6A).

Chapter 201 of the Massachusetts General Laws sets forth the statutory scheme for determination of incompetence and the appointment of a guardian of a mentally ill person. There is no other procedure for determining incompetency in Massachusetts. The law requires specific findings that the person is mentally ill and incapable of managing his personal and financial affairs. *Fazio* v. *Fazio*, 375 Mass. 394, 378 N.E.2d 951 (1978).

The scope and character of the power of a guardian has been elaborated by judicial decisions and legislative enactment. *Saikewicz*, *supra*; *Guardianship of Bassett*, 7 Mass. App. Ct. 56, 385 N.E.2d 1024 (1979); *Doe* v. *Doe*, 377 Mass. 272, 385 N.E.2d 995 (1979). The trend in state law is toward limitation of the guardian's comprehensive authority to act on behalf of his ward. *Roe*, *supra*. This trend bespeaks a recognition that the appointment of a guardian with plenary power indefinitely deprives the ward of the spectrum of right central to our concept of liberty.[1] Such a drastic measure is incompatible with the ward's corresponding right to have his fundamental liberties curtailed in the least restrictive manner. *Cf. Covington* v. *Harris*, 419 F.2d 617 (D.C. Cir. 1969) (principle of least restrictive alternative applies to unnecessary restriction of committed patients' liberties). See Zlotnick, "First Due No Harm: Least Restrictive Alternative Analysis

[1] A person adjudicated incompetent is deprived of many civil and legal rights, including the rights to vote, to enter into a contract, to make decisions regarding his place of residence and his involvement in programs and services, to travel at will, and to manage his property as he sees fit.

and the Right of Mental Patients to Refuse Treatment," 83 W. Va. L. Rev. 375 (1981).

The Massachusetts courts have recognized the injustices of the complete abrogation of the ward's rights in those areas where the ward can function competently and effectively promote his interest. A limited guardianship permits the personal exercise of rights by the ward without a reasonable risk to his welfare or property. *Bassett, supra.* Even where the ward's incapacity is manifest, the court has intervened to prevent unlimited discretion in the decisionmaking power of the guardian. *Doe, supra.*

The *Doe* decision, limiting the authority of the guardian to commit his ward to a mental hospital, was in part grounded on that part of the *Saikewicz* decision which clarified the *parens patriae* power of the state to act or authorize others to act in the best interest of the incompetent person. It was no longer sufficient for the state to accept decisions made in the objective best interest of the ward. *Saikewicz, supra,* 373 Mass. at 751, 370 N.E.2d at 428. "To protect the incompetent person within its power, the State must recognize the dignity and worth of such a person and afford to that person the same panoply of rights and choices it recognizes in competent persons." *Saikewicz, supra,* 373 Mass. at 746, 370 N.E.2d at 428. The *Saikewicz* court adopted the substituted judgment test to determine the right of an incompetent person to decline medical treatment in a manner that would "give the fullest possible expression to the character and circumstances of that individual." *Saikewicz, supra,* 373 Mass. at 747, 370 N.E.2d at 428. The Supreme Judicial Court recently extended the reasoning of *Saikewicz* to safeguard the right of an incompetent person to refuse medical treatment in the form of antipsychotic drugs. *Roe, supra.* The *Roe* court held that a judicial determination in accordance with the substituted judgment doctrine was the appropriate means of effectuating Richard Roe III's right to refuse medication. However, this

decision did not restrict itself to a simple determination of the rights of Richard Roe, III. The court went on to provide "guidelines . . . not directed toward a single case but rather identify the decision-making processes necessary to reach outcomes in a type of case." *Roe, supra*, Mass. Adv. Sh. at 1021, 421 N.E.2d at 62. The guidelines articulated in this case provide the legal foundation for answering the following questions: who may make treatment decisions on behalf of an incompetent person, and what legal and procedural standards guide the decisionmaker?

A. *Massachusetts Law Requires a Judge to Act as Substitute Decisionmaker to Consent to the Administration of Anti-psychotic Medication to an Incompetent Person.*

In determining who should act as the substitute decisionmaker for the incompetent, the court examined: (1) the intrusiveness of the proposed treatment; (2) the possibility of adverse side effects; (3) the existence of an emergency which the court defined as an unforeseen combination of circumstances or the resulting state that calls for immediate action;[2] (4) the nature and extent of prior judicial involvement; and (5) the likelihood of conflicting interests in making a substituted judgment on behalf of the ward. The court in *Roe* was careful to highlight the factors requiring a judicial decisionmaker with respect to forcible medication. Initially, the court relied on the intrusiveness of the proposed treatment. The

---

[2] In emergency situations, anti-psychotic drugs "function as chemical restraints forcibly imposed upon an unwilling individual who, if competent, would refuse such treatment," *Roe, supra*, Mass. Adv. Sh. at 1018, 421 N.E.2d at 60. This use of anti-psychotic drugs as restraint is regulated M.G.L. c. 123, §21, and Department of Mental Health regulations. This statute and the regulations allow the use of drugs as restraint only where there is a severe threat of or as a result of "extreme violence, personal injury or attempted suicide." 104 C.M.R. 312.

court found few legitimate medical procedures "are more intrusive than the forcible injection of antipsychotic medication." *Roe, supra*, Mass. Adv. Sh. at 1003, 421 N.E.2d at 52. The court found this medication to be at least as intrusive as psychosurgery or electroconvulsive therapy. *Id.* In conjunction with the intrusiveness of the treatment and its potential serious and permanent side effects, the court relied on the absence of an emergency (the eventual, but very gradual, deterioration of the ward's schizophrenia into a chronic and irreversible condition did not satisfy the emergency requirement), and the likelihood of conflicting interests (inability of a guardian, the ward's parent, to function as a disinterested decisionmaker in applying the substituted judgment test). The court concluded that absent an extreme emergency, only a judge can legally authorize the forcible administration of anti-psychotic medication. *Roe, supra*, Mass. Adv. Sh. at 981, 421 N.E.2d at 40.

B. *The Judicial Decisionmaker Must Apply the Substituted Judgment Test.*

When deciding how the judicial decisionmaker should determine whether or not to order the forcible medication of an incompetent person, the *Roe* court followed the teachings of *Saikewicz* and its progeny. The doctrine of substituted judgment is the mechanism by which the rights of the incompetent can be best protected. It assures that the doubts as to the appropriateness of a proposed course of action are reconciled with the subjective needs of the ward. The doctrine compels the decisionmaker to identify the choice which would be made by the incompetent, if that person were competent. The decisionmaker must take into account the present and future incompetency of the individual as one of the factors which would necessarily enter into the decisionmaking process

of the competent person. *Roe, supra*; *Saikewicz, supra*; see generally, *In re Boyd*, 403 A.2d 744 (D.C. Ct. App. 1979).

In applying the substituted judgment test, the court must consider: (1) the ward's expressed preference regarding treatment; (2) the ward's religious beliefs; (3) the impact of a decision upon the ward's family; (4) the probability of adverse side effects; (5) the consequences if treatment is refused; and (6) the prognosis with treatment. *Roe, supra*, Mass. Adv. Sh. at 1021, 421 N.E.2d at 57-58. "The proper balance to be struck in a given situation can only be determined after examining the specifically defined and precisely articulated interests" presented by a particular case. *Id.* Of these considerations, the ward's "'stated preference must be treated as a critical factor in the determination of his "best interests."'" *Roe, supra*, Mass. Adv. Sh. at 1012, 421 N.E.2d at 57. However, the persuasiveness of the other factors may overcome the ward's stated preference. For example, if the ward's prognosis without treatment were that his health would steadily and irreversibly deteriorate, and his prognosis with the medication was excellent, the court could properly determine that he would consent to the medication if he were competent and order the treatment. Of course, every patient will be individually affected by each of these factors. This obviously will require separate substituted judgment determinations to be made for each patient.

> Where the medical evidence, unchallenged at every turn and unimpeachable in its sincerity, shows that treatment will maintain or regain competence, this is a weighty factor to be considered by the judge as it would be considered by the affected individual. It is not conclusive, however. If the judge feels that the "best interests" of the ward demand one outcome but concludes that the ward's

substituted judgment would require another, then, in the absence of an overriding State interest, the substituted judgment prevails.

Roe, supra, Mass. Adv. Sh. at 1017 n.20, 421 N.E.2d at 59-60 n.20.

Furthermore, the court outlined procedural safeguards in cases where a compelling state interest may require the repudiation of a patient's right to refuse anti-psychotic medication. "If the [substituted judgment] determination is to refuse treatment, the judge may order treatment only in accordance with the procedures we discuss [below]." *Roe, supra*, Mass. Adv. Sh. at 1015-1016, 421 N.E.2d at 59. The court described in some detail the applicable state law, the appropriate state interests involved in the decision, and the findings and standard of proof applicable to decisions to override an individual patient's decision to refuse medication. Petioners argue that institutional considerations should permit the hospital to administer anti-psychotic medications over the patient's objections. This desire for institutional order is one of the factors to be considered by the court when applying the procedures outlined in *Roe*. See *Saikewicz, supra*; *Commissioner of Correction* v. *Myers*, Mass. Adv. Sh. (1979) 2523, 399 N.E. 2d 452; *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905).

C. *Civilly Committed Persons Retain the Right to Refuse Treatment.*

Any obligation of the state to provide treatment to committed patients is limited to making treatment available; it does not extend to the forcible administration of anti-psychotic drugs. *Roe, supra*, Mass. Adv. Sh. at 1016, 421 N.E.2d at 59-60. It is the responsibility of the patient to elect the course of treatment after being informed of the risks and benefits of

alternative treatment modalities and of the physician's opinion as to which treatment plan is in the patient's best interest. Patient participation in treatment decisions is recognized by Massachusetts regulation 104 C.M.R. 310(12). In the wards of Boston State Hospital, statements of patients' civil rights posted pursuant to this regulation notified patients that their informed consent was a prerequisite to treatment, *Rogers* v. *Okin*, 478 F.Supp. 1342, 1359 (D. Mass. 1979) (*Rogers I*), *aff'd in part, rev'd in part*, 634 F.2d 650 (1st Cir. 1980) (*Rogers II*), *cert. granted*, 101 S.Ct. 1972 (1981).

Because committed patients are presumed competent, their expressed desires with regard to medication must be respected. *Schloendorff* v. *Society of New York Hospital, supra*; *Lane* v. *Candura, supra*. If the patients are not capable of participating in the treatment process they must be adjudicated incompetent. Furthermore, the incompetency proceeding must designate the appropriate decisionmaker who will exercise the substituted judgment on behalf of the patient.

The necessity of a judicial decisionmaker does not cease because the incompetent patient to be medicated resides in an institutional setting. The considerations requiring judicial involvement in the case of a non-institutionalized ward equally affect an institutionalized ward. He too is to be treated by "a powerful, mind-altering drug which is accompanied by often severe and sometimes irreversible side effects," *Roe, supra*, Mass. Adv. Sh. at 983, 421 N.E.2d at 42, with uncertain benefits. Moreover, the likelihood that institutional personnel will have conflicting interests similar to those of the guardian in *Roe* (*cf. Roe, supra*, Mass. Adv. Sh. at 1009, 421 N.E.2d at 56) forbids the delegation of the decisionmaking responsibility to any non-judicial third party. This difficult question requires "'the process of detached but passionate investigation and decision that forms the ideal on which the judicial branch of government was created,'" *Roe, supra*, Mass. Adv. Sh. at 1001, 421 N.E.2d at 51, citing *Saikewicz, supra*.

III. This Court should Dismiss the Grant of Certiorari as Improvidently Granted Because the Massachusetts Courts, applying Massachusetts Law, have Settled the Issues of this Lawsuit for that State.

In *In the Matter of Guardianship of Roe*, Mass. Adv. Sh. (1981) 981, 421 N.E.2d 40, the Supreme Judicial Court of Massachusetts considered whether there is a constitutional right for a non-institutionalized individual to refuse anti-psychotic medication. Both of the major parties in this lawsuit intervened in the action and presented arguments both at the trial court and on appeal. The Supreme Judicial Court, in its decision upholding such a right to refuse medical treatment, specifically grounded its opinion not only upon federal constitutional grounds but also upon state constitutional grounds, state common law and the inherent power of courts. *Roe, supra*, Mass. Adv. Sh. at 983 n.1, 421 N.E.2d at 42 n.1. In light of the decision in *Roe* which rest upon independent state law grounds, this Court should not reach the merits in the instant case.

It is not a matter for dispute that this Court cannot review state court determinations of state law even when a case also involves federal issues. *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590 (1874). The major requirement is that the state law ground be independent and adequate. *Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935). "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb* v. *Pitcairn*, 324 U.S. 117, 125 (1945). "Under this doctrine federal courts cannot review decisions resting either exclusively on state law or on both federal and state law if the consideration of federal issues was unnecessary in light of the state law conclusions." Howard, "State Courts and Constitutional Rights in the Day of the Burger

Court," 62 Va. L. Rev. 873, 876 (1976), citing *State* v. *Kinney*, 138 Neb. 574, 293 N.W. 393 (1940), *rev. sub. nom.*, *Olsen* v. *Nebraska*, 313 U.S. 236 (1941), *on remand*, *Boomer* v. *Olsen*, 143 Neb. 579, 10 N.W.2d 507 (1943).

The power of state supreme courts to interpret their own constitutions is not limited. They may interpret their constitutions differently than this Court has interpreted the United States Constitution even where the provisions are identical. *State* v. *Kaluna*, 55 Haw. 361, 369 n.6, 520 P.2d 51, 58 n.6 (1974). Their independent right to act is well recognized. *E.g.*, *People* v. *Disbrow*, 16 Cal.3d 101, 113-115, 127 Cal. Rptr. 360, 545 P.2d 272, 280 (1976); *State* v. *Johnson*, 68 N.J. 349, 346 A.2d 66 (1975). See generally Brennan, "State Constitutions and the Protection of Individual Rights," 90 Harv. L. Rev. 489 (1977).

The Supreme Judicial Court of Massachusetts understandably tends to follow the lead of this Court in constitutional adjudication. Hennessey, "The Extraordinary Massachusetts Constitution of 1780," 14 Suffolk U. L. Rev. 873, 889 (1980). However, in recent years the Supreme Judicial Court has on occasion explicitly utilized state constitutional law to fashion rules different from the principles enunciated under federal constitutional law by this Court. Wilkins, "Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution," 14 Suffolk U. L. Rev. 887, 889-890 (1980). Examples include the standards of proof required for involuntary civil commitment; compare *Addington* v. *Texas*, 441 U.S. 418 (1979), and *Superintendent of Worcester State Hospital* v. *Hagberg*, 374 Mass. 271, 274, 372 N.E.2d 242 (1978), and whether the states must utilize Medicaid funding to pay for abortions. *Harris* v. *McRae*, 448 U.S. 297 (1980), and *Moe* v. *Secretary of Administration and Finance*, Mass. Adv. Sh. (1981) 464, 417 N.E.2d 387 (1981).

With regard to the issue of the constitutional right to refuse medical treatment for incompetent as well as competent patients, the decision of the Supreme Judicial Court is stated to rest clearly upon state constitutional grounds, state common law, and the inherent powers of courts as well as federal constitutional grounds. The decision expands upon other Massachusetts cases which recognize a strong privacy interest. See *Moe*, *supra*, Mass. Adv. Sh. at 485, 417 N.E.2d at 399; *Superintendent of Belchertown State School* v. *Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977); *Custody of a Minor*, 375 Mass. 733, 379 N.E.2d 1053 (1978), *on review and redetermination*, 377 Mass. 876, 393 N.E.2d 836 (1979); *In the Matter of Spring*, Mass. Adv. Sh. (1980) 1209, 405 N.E.2d 115. See generally Brant, "Last Rights: an Analysis of Refusal and Withholding of Treatment Cases," 46 Mo. L. Rev. 337 (1981). Although *Roe* makes reference to *Rogers I* and *Rogers II*, it is obvious that the decision, as clearly stated in n.9, is not subject to review by this Court because it is grounded in state law. Thus, any decision by this Court in *Rogers* will not impact the law of Massachusetts. The principles of federalism require this Court to decline to reach the merits in *Rogers*. Douglas, "State Judicial Activism — The New Role for State Bills of Rights," 12 Suffolk U. L. Rev. 1123 (1978); Bellotti and Schultz, "Federalism — The Massachusetts Experience," 12 Suffolk U. L. Rev. 1225 (1978).

Should there be any doubt as to whether an adequate and independent state ground exists, this Court should abstain from deciding the present case and remand it with questions certified to the Massachusetts Supreme Judicial Court before reaching the merits. *Ohio* v. *Gallagher*, 425 U.S. 257 (1976). Such doubts can only arise over the uncertainty of the Massachusetts courts' application of the state law described in *Roe* to the institutionalized mental patients represented in the present case. "Abstention is appropriate 'in cases presenting

a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.'" *Colorado River Water Conser. Dist.* v. *United States*, 424 U.S. 800, 814 (1976), citing *Allegheny County* v. *Frank Mashuda Co.*, 360 U.S. 185, 189 (1959).

Conclusion.

For the reason stated in this brief, the decision of the United States Court of Appeals for the First Circuit should be reversed and remanded.

Respectfully submitted,

ROBERT H. WEBER,
Mental Health Legal Advisors Committee,
294 Washington Street,
Suite 840,
Boston, Massachusetts 02108.
(617) 723-2876

JONATHAN BRANT,
New England School of Law,
126 Newbury Street,
Boston, Massachusetts 02116.
(617) 267-9655

On the Brief:
RICHARD CASTELNUOVO